SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1044

CLINTON H. MITCHELL, and CLINTON MITCHELL FOUNDATION,

Appellants,

vs.

R. A. RIDDELL, District Director of Internal Revenue, and UNITED STATES OF AMERICA,

Appellees.

On Appeal From Judgments of United States Court of Appeals for the Ninth Circuit.

APPELLANTS' JURISDICTIONAL STATEMENT.

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APPELLANTS' JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is claimed for the following reasons (Indexes follow those of S. Ct. Rule 15):

(a) Copy of the official report of the Ninth Circuit Court of Appeals is appended, of October 24, 1968, for which rehearing was denied November 19, 1968; parties above having been identified and accepted therein.

(b)(i) The proceedings below based on appellants' claim of unconstitutionality of (1) The ". . . . except in Federal tax matters . . ." phrase of 28 U.S.C. 2201; and (2), allied thereto, unconstitutionality of 26 U.S.C. 7422-f-1 and 7423; which latter were brought into issue

by appellees in the original hearing in the District Court. Appellants further having claimed depri.ation of property without due process by the exception phrase of 2201.

(ii) Dates of judgment, and denial of rehearing are as shown in (a) above: Notice of Appeal was filed in the Court below December 5, 1968.

(iii) Appellant claims jurisdiction of this Court under U. S. Constitution, Art. III,

> "Judicial power shall extend to all cases, in Law and Equity, arising under this Constitution—to controversies to which the United States shall be a party—in all the (other) cases before mentioned the Supreme Court shall have appellate jurisdiction. . . ."

And under 28 U.S.C. 2072; by which the Congress regulated to this Court

> ". . . the power to prescribe by general rules the forms—practice and procedure—for judicial review of orders of administrative agencies and officers. . . . All laws in conflict with such rules shall be of no further force or effect."

And under 28 U.S.C. 1361:

> "The District Courts shall have original jurisdiction of any action of mandamus to compel an officer or employee of the United States—or agency —to perform a duty owed to the plaintiff."

And Section 1340,

> "The District Courts shall have original jurisdiction of any civil action arising under Acts of Congress providing for internal revenue. . . ."

(These Codes relating to the original question, but having been rendered subordinate to the present question of unconstitutionality); and of reason that this Court has ruled (#19)

". . . (Reasons which will be considered) Where a Court of Appeals—has decided an important question—which should be decided by this Court—or has decided a federal question in a way in conflict with applicable decisions of this Court—or has so far departed from accepted and usual course of judicial proceedings—or sanctioned such by a lower Court, as to call for exercise of this Court's power of supervision."

(iv) Cases cited, as among many others, supporting our claims:

Heiner v. Donnan, 285 U.S. 312,

"(5) Federal statutes under taxing power may be so arbitrary and capricious as to be unconstitutional—(6) Individual, innocent of evasion, may not be stripped of his constitutional rights in order to further a more thorough enforcement of tax against the guilty—(to do so) would be a new and startling doctrine, condemned by its own mere statement, and distinctly repudiated by this Court—has held more than once that a statute which denies opportunity to rebut violates due process—a constitutional prohibition cannot be transgressed indirectly by creation of statutory presumption—any more than it can be violated by direct enactment—."

Ninth Circuit Court of Appeals quotes from above, 1958, and was affirmed by this Court, in *Spencer v.*

Randall, 78 S. Ct. 1332, 2 L. Ed. 2d 1460.—Also, affirmed by this Court, *Mooney v. Holohan,* 55 S. Ct. 340, 294 U.S. 103, "Any legislative agency—denying due process is inhibited." Again, in 9th C.A. (repeating from *Endicott Johnson,* 45 S. Ct. 61, 69 L. Ed. 288 as affirmed by this Court), *People of State of Calif. v. Lamson,* 80 F. 2d 388, "Due process—means course of legal proceedings according to rules established for protection and enforcement of private rights."

Other cases: *Walker v. U.S.,* 254 U.S. 939, ... L. Ed. 1538; *Kilbourn v. Thompson,* 103 U.S. 168; *United States v. Lee,* 1 S. Ct. 240, 27 L. Ed. 171; *Adkins v. Children's Hospital,* 43 S. Ct. 394, 67 L. Ed. 785; *Fletcher v. Peck,* 10 U.S. 87, 3 L. Ed. 162; *Murray v. Hoboken Land,* 59 U.S. 272, 15 L. Ed. 372; *United States v. Salberg,* 287 F. 2d 208; *Hagar v. Reclamation Distr.,* 4 S. Ct. 663, 28 L. Ed. 569; *Endicott Johnson v. Encylc. Press,* 45 S. Ct. 61, 69 L. Ed. 288; *Sims v. Reeves,* 56 S. Ct. 960, 80 L. Ed. 1402; *Lee v. Fleming,* 67 S. Ct. 1168, ... L. Ed. 1826; *Home Insurance v. Morse,* 87 U.S. 445, 22 L. Ed. 365; *Helvering v. U.S.,* 293 U.S. 144; *Rollins College,* 138 F. 2d 581; and again, 9th C.A., 1966, *Howard v. U.S.,* 372 F. 2d 294. These and a spate of others accent undeniably that "due process" includes access to all the courts, which may not be abridged by legislative hindrance.

(v) The validity of the following statutes is involved:

> 28 U.S.C. 2201: In a case of actual controversy within its jurisdiction—*"except with respect to Federal taxes*—any Court of the United States—may declare the rights. . . ." (The italicized exception phrase being the portion under question.)

26 U.S.C. 7422-f-1: A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee—of the U.S.—or his personal representative. (Subsection a referring to suits for recovery of taxes claimed illegally paid or collected.)

26 U.S.C. 7423: The Secretary (IRS)—is authorized to repay—to any officer or employee—the full amounts of such sums as may be recovered—for any internal revenue taxes collected by him—with costs and expenses—also for all damages and costs recovered against—by reason of anything done in due performance of official duty under this title.

And the Codes quoted under (iii) above, 2072, 1340, and 1361.

(c) The questions involved are:

1. That the "except with respect to Federal taxes" phrase of Code 2201 is unconstitutional.

2. That Codes 7422-f-1 and 7423 are arbitrary, unreasonable, and capricious in their making federal officials immune from any suit or penalty for any wrongdoing—however arbitrary, capricious, or in abuse of authority—and thereby unconstitutional.

Both as noted in appellant's Notice of Appeal, timely filed as in (b)(ii) above.

3. Subsidiary questions involve denial by appellee of certain rights as specifically mandated for appellant under 26 U.S.C. 501-a. These questions are moot unless question 1 above is upheld.

(d) The Ninth Circuit Court, in the origin of this proceeding, had ruled itself impotent to act in a Federal

tax matter, under the exception phrase, Code 2201 above. The Court declined to comment on appellant's claim of unconstitutionality, and likewise declined any mention of appellant's included claim against codes 7422-f-1 and 7423, which had been introduced by appellees before the District Court.

Appellants brought to the Ninth Court of Appeals the questions of unconstitutionality; and further asked, if his first claim be upheld, that the original question of declaratory judgment be heard. This original matter became "moot" as stated in the judgment of the Court.

Appellant argued orally before the Appeals Court that 2201 contradicted 28 U.S.C. 1361:

> "District Courts—original jurisdiction—any action—mandamus—to compel an officer of the United States to perform a duty owed to the plaintiff."

And pointed that Code 26-501-a stated: ". . . shall be exempt from taxation . . ." and left no discretion to the tax officials, when the conditions of the code had been met and without denial by the officials.

Appellant further cited, in his petition for rehearing of the adverse decision (a), above, that the Court below, in its findings and cited cases and laws, had overlooked 28 U.S.C. 2072, which, as amended July 1, 1968, stated:

> "The Supreme Court shall—prescribe—by general rules—forms—pleadings—for judicial review or enforcement of orders of administrative agencies—or officers—all laws in conflict with such rules shall be of no force or effect after such rules have taken effect."

Since neither this rule nor the exception clause of 2201 could stand in the presence of the other, the later law must prevail, and the exception clause become void.

Appellant also noted, in his petition for rehearing, reference by the Appellant to existence of other remedies; and cited FRCP Rule 57, "Existence of another adequate remedy does not preclude declaratory . . ."; and cited codes 1340 and 1361 (shown in (b)(iii), above), as contradicting the exception in 2201. Appellant assumes judicial knowledge of the general theme of decisions follows that in case of doubt, uncertainty, and ambiguity, resolution would against the government, and in favor of the citizen, especially in charitable uses (*Mueller,* 190 F. 2d 120).

The Appellate Court (judgment, (a) above) affirmed the District Court in its dismissal of the original complaint under 2201 and followed the District Court in likewise omitting any mention of the claims against 7422-f-1 and 7423.

Appellant also noted before the Appeals Court that the government's reply was considerably belated under rules of this Court, with prayer that said reply be not heard. Recognized that the Appellate could move of its own accord to over-rule appellant and hear appellee despite the cited delay; but we feel the Court erred in proceeding with no attention to appellant's prayer.

(f) Appellant claims that error in the Appellate is such as to demand "exercise of this Court's power of supervision" under Rule 19. Fundamental error is clearly shown in appellate judgment, (a) above, page 6, first paragraph,

> "The only issue before us is whether appellants are entitled to a declaratory judgment—(page 7) No constitutional question is involved."

The constitutional question was the basic and controlling presentation: Appellant's brief on appeal, page 2, item 3, states:

> "This appeal bases on two questions—Question One, our claim of unconstitutionality (as raised in the District Court, quoted); Question Two (original plea for summary and declaratory)"

Page 3, item 4,

> "Can only stand upon sustention of our unconstitutional claim, and is accordingly relegated to a lower position."

Reply of appellant to appellee's answer followed (p. 3, Part II)

> "Appellant's cause rests basically on his claim of unconstitutionality (exc. phrase of 2201) and 7422-f-1 and 7423—appellee ignores this claim completely and presents no refutation thereof."

And appellant argued orally before the Appellate Court

> "We are now before this Court on two questions, of unconstitutionality, and of consideration of his motion for summary judgement (declaratory)—Unitl we can establish our claim on the first, there can be no consideration of the merits of the second."

Further error of the Court shows in its statement that appellant is not deprived without due process, in that he has other adequate remedy, "when assessed". But the Court also found that no assessment was ever

made; and that a token payment by appellant in effort to induce judgement was ordered refunded, merely as an illegally collected payment, and without judgement. Meanwhile we continue under the continuing threat of the

> "Damoclean sword—which a harassing adversary might brandish, while instituting suit at his leisure, or never—" (257 F. Supp. 219, Japan Gas Lighter).

Further error of the Court is claimed in its indifference and omission of comment on the oral presentation of 26 U.S.C. 7214, which provides for actions and damages against Federal officers "who willfully oppresses under color of law" and is in negation of 7522-f-1 and 7423.

This matter cries for "exercise of this Court's power of supervision", in that the Courts below have declined to consider the simple, clear, and rightful presentation of federal controversy and of constitutional rights. It goes beyond tax matters, for no tax has been in question. Can a Federal official be rendered immune, by statute, from protest while he arbitrarily and without explanation deprives a citizen of right to enjoy employment of his property for charitable purposes?

This matter likewise goes beyond the harassment of one individual, to the broad and basic question of how long can a "giant bureaucracy", unconstitutionally immune from the courts, continue with

> "acts like a gestapo, preying upon defenseless citizens—morally corrupted by the enormous power with which we in Congress have unwisely entrusted it—The small taxpayer who is hurt worst in his

attempt to deal with this giant bureaucracy". (Senators Long, and Dirksen, Reader's Digest Aug. 1967, followed by Sept. 1968; Tyranny in the Internal Revenue Service, and Time for Reform in the IRS, in a well documented series.)

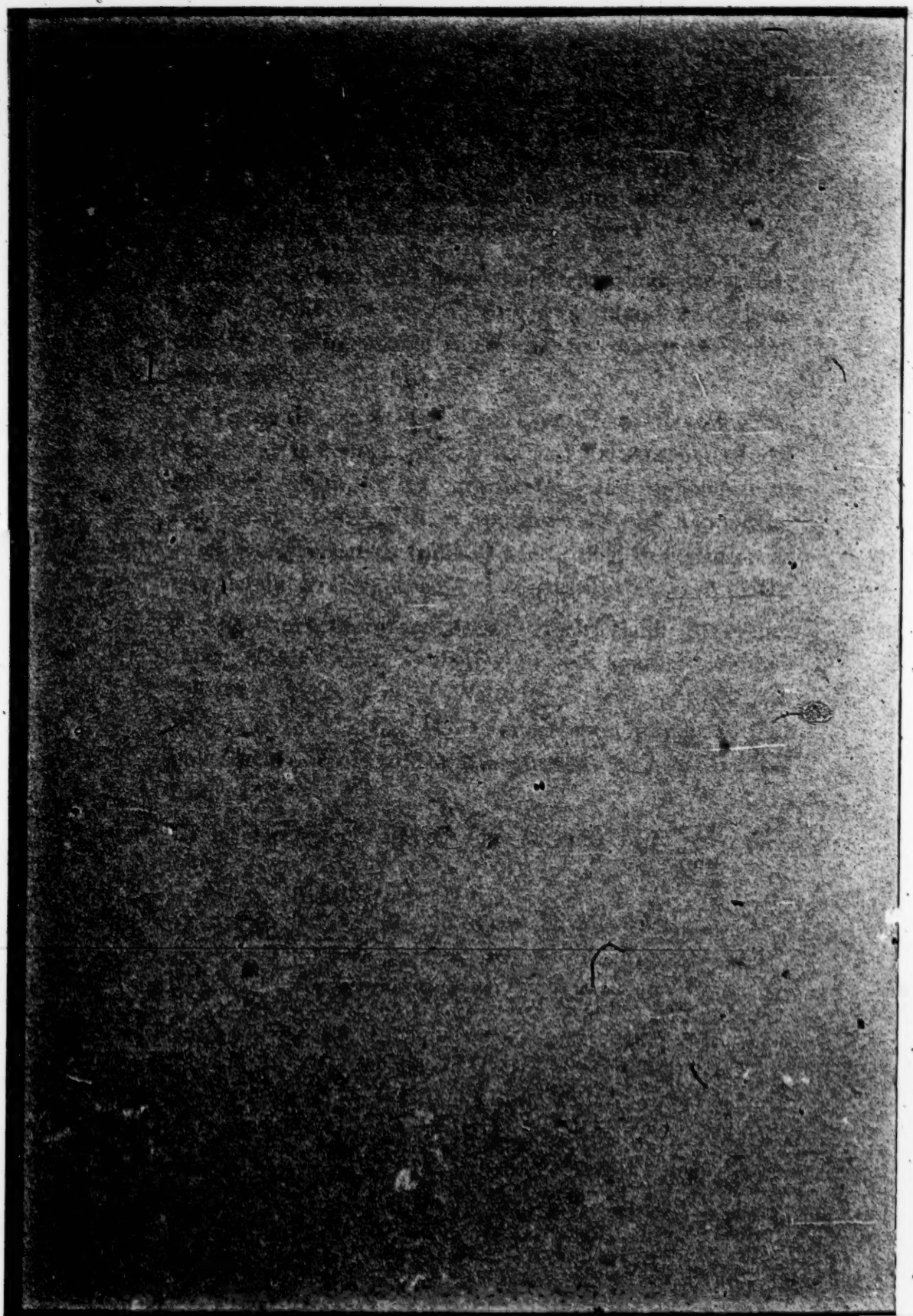
Herein is presented a long-slumbering and demanding need for relief for the so many who submit to persecution from being unable financially to combat the omnipotent IRS.

We again claim the Court erred in devoting its expressed judgement to review and affirmation of the appellee's claim of no controversy, and impotence of the Court under 2201. Appellee's list of supporting cases were repeated, and had been called to attention as completely irrelevant to the constitutionality of 2201.

Appellants therefore present their claim for relief through this Court, as their "bulwark against tyranny" (9th CA 1965, *United States v. Brown,* affirmed in 85 S. Ct. 381, ... U.S. 437); and respectfully plead that our further briefs and oral arguments be heard in this Court.

(h) Documents specified are included in (a) above.

CLINTON H. MITCHELL,
In person, and for Clinton Mitchell Foundation.



APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Clinton H. Mitchell and Clinton Mitchell Foundation, *Appellants,* vs. R. A. Riddell, District Director of Internal Revenue, and United States of America, *Appellees.* No. 22,406.

[October 24, 1968]

On Appeal from the United States District Court for the Central District of California.

Before: JERTBERG and DUNIWAY, Circuit Judges, and TAYLOR,* District Judge.

JERTBERG, Circuit Judge:

Appellants, Clinton H. Mitchell and Clinton Mitchell Foundation (plaintiffs below), appeal from two orders of the District Court,—one denying appellants' motion for a summary judgment, and the other granting the motion of appellees for dismissal of the action for lack of jurisdiction over the subject matter of the action.

On April 14, 1967, appellant, Clinton H. Mitchell, in pro per, filed a complaint in the district court, solely in his own name, against R. A. Riddell, a retired District Director of the Internal Revenue Service at Los Angeles. On August 25, 1967, on stipulation of counsel and approval of the district court, the appellant, Clinton Mitchell Foundation, was joined as a party-plaintiff on the ground that the Foundation was the real party in interest.

*Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

We have been unable to find in the record any order of the district court joining the United States of America as a party-defendant. In view of the provisions of 26 U.S.C. § 7422(f)(2),[1] we shall treat the United States of America as a party-defendant in this action, and as an appellee on this appeal. The United States of America makes no contention otherwise.

The complaint alleges that appellant, Clinton H. Mitchell, on January 1, 1963, established an *inter vivos* trust, retaining management in himself. The name or designation of the trust is not mentioned in the complaint.

The complaint further alleges that the trust instrument requires that the trust's entire net income, after specified life interests payable to Clinton H. Mitchell, be paid exclusively to, or for the use of, charitable purposes; that no tax deductions were claimed by Mitchell on his contributions to the trust; that in four years of operation, Mitchell has reported to the Internal Revenue Service over $17,000.00 given to charitable purposes and has claimed, under the reserved life interests, a total of only $1945.80; and that full reports of all operations of the trust have been duly filed.

---

[1] 26 U.S.C. § 7422(f)(2) reads, in pertinent part:

"(2) *Misjoinder and change of venue.*—If a suit or proceeding brought in a United States district court against an officer or employee of the United States (or former officer or employee) or his personal representative is improperly brought solely by virtue of paragraph (1), the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action commenced, upon proper service of process on the United States. Such suit or proceeding shall upon request by the United States be transferred to the district or division where it should have been brought if such action initially had been brought against the United States."

The complaint purports to state two causes of action. In the first cause of action it is alleged that upon completion of the first year of operation of the trust, the Internal Revenue Service denied an application of Mitchell to have the trust declared a tax exempt organization, and requested that the trust report its income as a taxable organization; that in the intervening years the Internal Revenue Service persisted in its refusal to recognize the trust as a tax exempt organization and persisted in its demand that the trust report its income as a taxable organization; that because Mitchell is over seventy-two years, and time is "running out," and in order to clarify tax status of the trust, Mitchell

> "did remit, on May 3, 1966, the sum of Ten Dollars to defendant, and included the statement that no tax was due for any time of operation, under the law, and calling for its refund, with reasons stated"; and

no reply to said demand has been made.

This cause of action prays the court to find "that defendant does owe him the refund of said ten dollars, as having been unlawfully demanded and accepted from plaintiff."

In the second cause of action plaintiff alleges that all income of the trust has been distributed as:

> "—in the case of an estate or a trust—paid to or permanently set aside for—exclusively charitable purposes—pursuant to terms of the governing instrument—any amount, without limitation—shall be allowed as a deduction—. (Sec. 642, Internal Revenue Code.)"

The prayer under the second cause of action is that the trust operations described in the complaint

> "be found within the tax exempt description of IRC Sec. 642, * * * and/or any other applicable laws; and that defendant be found indebted to plaintiff in amount of said ten dollars, plus interest, for over-payment of income tac (sic) unlawfully demanded and accepted."

The record discloses that on September 29, 1967, the parties entered into a stipulation which, after reciting that the plaintiffs had brought the instant action for a refund of Federal taxes in the amount of ten and no/100 dollars ($10.00), "which amount is not, and never has been, the subject matter of an assessment against the plaintiffs, either individually or jointly," and that "the defendant has agreed to refund to plaintiff Clinton Mitchell the said sum of ten and no/100 dollars ($10.00), receipt of which amount is hereby acknowledged by said plaintiff," provided:

> "1. Plaintiff Clinton Mitchell has been refunded the amount of ten and no/100 dollars ($10.00) referred to above;
>
> "2. Plaintiffs and defendant agree that the acceptance of said amount by Clinton H. Mitchell shall not be construed to preclude a later assertion that the Clinton Mitchell Foundation is a tax-exempt organization;
>
> "3. Plaintiffs and defendant agree that payment of said amount of defendant shall not be deemed to constitute an admission that the Clinton Mitchell Foundation is a tax-exempt organization."

By later written stipulation, Mitchell waived claim to the payment of any interest on said sum of $10.00.

Prior to the return of said sum of $10.00, plaintiffs filed a "Motion for Summary Judgment and Mandate," in which they prayed that the "charitable foundation be held tax-exempt," and "that such condition continue to apply during such time as they remain in compliance with pertinent and applicable codes and laws."

Prior to the filing of plaintiffs' motion, the appellees had moved for dismissal of the action upon the ground, *inter alia,* that the court lacks jurisdiction of the subject matter of the action.

The district court denied plaintiffs' motion for summary judgment, stating among other things:

> "First of all, the record is clear that plaintiffs, since the filing of this action, have received from the United States of America the sum of Ten Dollars ($10.00) and that plaintiffs have waived any statutory interest thereon. Therefore the Court need only determine whether or not this Court has jurisdiction of the remaining subject matter of the action. Aside from the claim of plaintiffs for Ten Dollars ($10.00), which claim has been satisfied by the voluntary payment by United States of America to plaintiffs, plaintiffs seek declaratory relief decreeing that plaintiff Foundation is a tax-exempt Foundation. It appears from the stipulation of the parties on file herein, and from admissions of the individual plaintiff in open court, and from other documents and records in the case, that no assessment for income taxes has been levied against plaintiff Foundation.

"Inasmuch as plaintiffs are here seeking to secure declaratory relief with respect to taxes, something not permitted by Section 2201 of Title 28, United States Code, their motion for summary judgment must be denied."

In the order of the district court granting appellees' motion to dismiss the action, it is stated, among other things, that:

"It further appears frm the record of the proceedings of the hearing on the motion to dismiss herein * * * that the sole relief which they [plaintiffs] seek now that payment of the Ten Dollars has been accomplished is the decree establishing that the plaintiff Foundation is a tax-exempt organization. It further affirmatively appears that plaintiffs do not intend to amend their complaint to allege that there has been any tax assessment by the United States against plaintiff Foundation, and they do not intend to amend their complaint to allege that there has been any payment by them or either of them, complete or partial, of any tax assessment against plaintiff Foundation by the United States. * [5] *

"It is clear that this action should be dismissed for lack of jurisdiction in the Court over the subject matter of the action where, as here, there is no longer pending before the Court the right of plaintiffs to recover the Ten Dollars ($10.00) heretofore voluntarily paid by plaintiffs to the Internal Revenue Service plus interest thereon. Plaintiffs have received such Ten Dollar sum and have waived interest thereon.

> "Title 28, United States Code, Section 2201, makes clear that there is no jurisdiction in this Court to declare the rights and other legal relations of plaintiffs or either of them with respect to federal taxes. * * *"

Appellants' basic contention on this appeal is that the dismissal of the action violated the due process clause of the Fifth Amendment, in that by such dismissal they have been foreclosed from judicial review of the action of the Internal Revenue Service in refusing to recognize the Foundation as a tax exempt organization. As a corollary they contend that the provision of 28 U.S.C. §2201, interdicting controversies with respect to Federal taxes, is unconstitutional for the same reason.

The record is clear that the first cause of action set forth in the complaint, under which plaintiffs sought to recover the sum of $10.00 which they voluntarily remitted to the internal Revenue Service, became moot on their acceptance of the voluntary payment of that sum by the Government, to them. Hence, the only issue before us on this appeal is whether the appellants are entitled to a declaratory judgment determining that the Foundation qualifies as a tax exempt organization for Federal tax.

28 U.S.C. § 2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of any appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

It appears undisputed in the record that no assessment for federal income taxes has ever been levied against the Foundation, or against Clinton H. Mitchell as its alter ego. For such reason no "actual controversy" exists under the record before us. More important, however, is the interdiction "except with respect to Federal taxes," contained in the above quoted section. This Court, and other Circuit Courts, unanimously hold that under the specific terms of § 2201 the courts have no jurisdiction to enter declaratory judgments with respect to Federal taxes. See *Mayer v. Wright,* 251 F.2d 178 (9th Cir. 1958); *Martin v. Andrews,* 238 F.2d 552 (9th Cir. 1956); *Noland v. Westover;* 172 F.2d 614 (9th Cir.), *cert. denied* 337 U.S. 938 (1949); *United States v. Teitelbaum,* 342 F.2d 672 (7th Cir. 1965); *England v. United States,* 261 F.2d 455 (7th Cir. 1958); *Carmichael v. United States,* 245 F.2d 676 (5th Cir. 1957); *Wilson v. Wilson,* 141 F.2d 599 (4th Cir. 1944); *The Jolles Foundation, Inc. v. Moysey,* 250 F.2d 166 (2d Cir. 1957); *Sweeney v. United States,* 285 F.2d 444 (Ct.Cl. 1961); and *Kyron Foundation, Inc. v. Dunlop,* 110 F.Supp. 428 (D.D.C., 1952).

Appellants here contend that the exception in respect to Federal taxes contained in §2201, unconstitutionally deprives them of due process by denying them judicial review of the action of the Internal Revenue Service in refusing to recognize the Foundation as an exempt organization. There is no substance in such contention. No constitutional question is involved. The declaratory judgment Act. is a creature of statute, and, as observed by the Supreme Court in *United States v. Sherwood,* 312 U.S. 584, 586 (1941):

> "The United States, as sovereign, is immune from suit save as it consents to be sued, *United*

States v. Thompson, 98 U.S. 486; *United States v. Lee,* 106 U.S. 196; *Kansas v. United States,* 204 U.S. 331; *Minnesota v. United States,* 305 U.S. 382, 387; *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381, 388; *United States v. Shaw,* 309 U.S. 495 (see cases cited in *The Pesaro,* 277 F. 473, 474, *et seq.*), and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."

The facts in the instant case are almost identical to the facts in *The Jolles Foundation, Inc. v. Moysey, supra.* For the benefit of appellants, we quote extremely pertinent language appearing at page 169 of that case:

"Quite apart from the question of whether there is an 'actual controversy' and the express exception in the Declaratory Judgment Act removing from the courts the power to declare rights 'with respect to Federal taxes,' the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption. His duty is to decide whether the particular activities submitted to him justify exemption. He cannot be foreclosed by declaratory judgment from reviewing the purposes and activities of applicants for exempt status when and as they are presented to him for decision. The Foundation's own case illustrates the situation. In 1947 the facts warranted exemption; in 1952 a changed purpose brought termination. Its history and activities in 1954 did not produce any change of ruling but the Foundation may still avail itself of the right to show any change of activities and again seek exemption. A declaratory judgment upon

> the facts here set forth would serve no purpose. Nor is it the function of the courts to decide hypothetical future cases not yet in being. No judgment herein could be held to preadjudicate the issue of the Foundation's status for the future, thus stripping the Internal Revenue Service of its power to pass upon that question."

Appellants are not without a remedy. The Congress has provided ample machinery for the settlement of income tax controversies. In the event a tax is assessed against the Foundation, judicial review of such assessment may be sought under the provisions of 26 U.S.C. §7422 by paying the tax and seeking a refund in the district court, or by petitioning the Tax Court of the United States, prior to paying the tax, and in the event of an adversse decision by the Tax Court by petitioning this Court to review the decision of the Tax Court.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1044

CLINTON H. MITCHELL, AND CLINTON MITCHELL FOUNDATION, APPELLLANTS

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Pursuant to Rule 16(1)(a), appellees move to dismiss this appeal. Treating the appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103, the writ should be denied.

QUESTIONS PRESENTED

1. Whether the clause of 28 U.S.C. 2201 excepting matters with respect to federal taxes from the provisions of the Declaratory Judgment Act is unconstitutional?

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2. Whether Section 7422(f) of the Internal Revenue Code of 1954, which provides that an action for refund may be maintained only against the United States and not against any officer or employee of the United States, and Section 7423 which provides for repayment to officers or employees of the United States for sums of money recovered against them in court for any internal revenue taxes collected by them, or damages recovered against them by reason of anything done in the performance of their official duty are unconstitutional?

STATUTES INVOLVED

28 U.S.C. 2201:

Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Internal Revenue Code of 1954:

SEC. 7422 [as amended by Sec. 3(a), Act of November 2, 1966, P. L. 89–713, 80 Stat. 1108]. CIVIL ACTIONS FOR REFUND.

* * * * *

(f) *Limitation on Right of Action for Refund.*—

(1) *General rule.*—A suit or proceeding referred to in subsection (a) may be main-

tained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue).

* * * * *

(26 U.S.C. 7422.)

SEC. 7423. REPAYMENTS TO OFFICERS OR EMPLOYEES.

The Secretary or his delegate, subject to regulations prescribed by the Secretary or his delegate, is authorized to repay—

(1) *Collections recovered.*—To any officer or employee of the United States the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) *Damages and costs.*—All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title.

(26 U.S.C. 7423.)

STATEMENT

Appellant Clinton H. Mitchell, appearing *pro se* and on behalf of the appellant Mitchell Foundation, brought an action in the United States District Court for the Southern District of California, seeking the

refund of $10 he had voluntarily paid to the Internal Revenue Service, although no tax deficiency had been determined. The avowed purpose of the action was to obtain a determination that the Mitchell Foundation was exempt from federal income taxes (J.S. A3).[1] After the Internal Revenue Service refunded the $10 to Mitchell, he sought to continue the litigation as an action for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. 2201.

The district court concluded that the action should be dismissed because it lacked jurisdiction over the subject matter, noting that the Declaratory Judgment Act by its terms applies only to "a case of actual controversy * * * except with respect to Federal taxes * * *" (J.S. A6–7). The court of appeals, after adding the United States as a party, affirmed. (J.S. A 1–10.)

ARGUMENT

1. The appeal should be dismissed. Because the court of appeals has sustained the constitutionality of Acts of Congress, and no State statute is involved (J.S. 1–3), this case does not come within any statu-

[1] In his complaint, Clinton Mitchell stated that he established an intervivos trust retaining management in himself and designating that the entire net income, except for specified life interests retained by him, be paid exclusively for charitable purposes. He sought the approval of the Internal Revenue Service of his foundation as a tax-exempt organization (presumably under Section 501(c)(3), although this section is not specified in his complaint) and asked further that his foundation be allowed a deduction for amounts set aside by the governing instrument of an estate or trust for exclusively charitable purposes pursuant to Section 642 of the Code. (R. 2–5.)

tory provision allowing direct appeal of a court of appeals decision to this Court. See 28 U.S.C. 1256, 1254(2).

2. Treating the appeal as a petition for a writ of certiorari, 28 U.S.C. 2103, there is no question warranting further review. The United States, as sovereign, is immune from suit save as it consents to be sued. *United States* v. *Sherwood,* 312 U.S. 584, 586. There is no constitutional requirement that the United States consent to actions against it for declaratory judgments. The general question of whether the Declaratory Judgment Act applies to actions against the United States is now before the Court in *United States* v. *King,* No. 672, this Term. But whatever may be the outcome of *King,* the statute by its express terms forecloses declaratory judgments in tax controversies such as this. As this Court noted in *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 301, the 1935 amendment excluding all cases involving federal taxes from the operation of the Declaratory Judgments Act, "was passed merely for the purpose of 'making it clear' that the Declaratory Judgments Act would not permit 'a radical departure from the long-continued policy of Congress' to require prompt payment of federal taxes. See S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11; H.R. Rep. No. 1885, 74th Cong., 1st Sess., p. 13."

Congress has provided full and adequate remedies for the settlement of federal tax controversies, which are available to appellants. If they desire to obtain a judicial determination as to the tax status of the

Foundation, they may file income tax returns for the Foundation claiming exemption. The statute of limitations will then begin to run with respect to assessment of any deficiency. See Section 6501 of the 1954 Code, 26 U.S.C. 6501. If a deficiency is asserted against the Foundation, judicial review may be obtained by paying the tax and following the prescribed refund procedures, or by seeking a redetermination in the Tax Court. See Sections 6213, 6532, and 7422 of the 1954 Code, 26 U.S.C. 6213, 6532, 7422. In addition, there would be no justiciable controversy unless and until a deficiency is asserted.

3. Appellants' second argument, *i.e.*, that Sections 7422(f)(1) and 7423 of the Internal Revenue Code of 1954 are unconstitutional because they make federal officials immune from any suit or penalty for wrongdoing, is not well taken. Section 7422(f)(1) does not deprive any taxpayer of any substantial right in requiring that his action for refund of taxes must be brought against the United States rather than the officers or employees who collected it, nor is any taxpayer's economic position altered by the provision in Section 7423(1) for reimbursement of those officers who formerly had taxes recovered from them.

CONCLUSION

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, the writ should be denied.

Respectfully submitted.

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MARCH 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MITCHELL ET AL. *v.* RIDDELL, DISTRICT DIRECTOR, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1044. Decided April 1,1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.